(1)

90-217

No.

Supreme Court, U.S.
FILED
JUL 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JUDITH A. BROWN AND AMERICAN LIFE LEAGUE, INC.,
Petitioners,

v.

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC AND
NORTHEAST WOMEN'S CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARION EDWYN HARRISON*
DANIEL M. REDMOND
LAW OFFICES MARION EDWYN HARRISON
840 The Watergate
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 965-0800
Attorneys for Petitioners

* *Counsel of Record*

July 31, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether a district court has jurisdiction to impose Federal Rule of Civil Procedure 11 sanctions when the FRCivP 11 motion is filed subsequent to the plaintiffs' voluntary dismissal pursuant to FRCivP 42(a)(2)?

2. Whether a court of appeals panel may deny merits review of an otherwise reviewable issue—district court denial of FRCivP 11 sanctions—when (1) circuit internal operating procedures require a panel not to overrule another panel; (2) a prior panel has announced a "supervisory rule" depriving the district court of jurisdiction; and (3) in another case, a third panel, ignoring the supervisory rule, reviews on the merits?

PARTIES TO THE PROCEEDINGS

There is no parent or subsidiary company to be listed with respect to Petitioner American Life League, Inc. Rule 29.1.

Originally there were eleven Plaintiffs before the District Court. The District Court dismissed on December 5, 1988 fictitious-name Plaintiffs Jane Roe and Mary Moe and on December 20, 1988 Plaintiffs Planned Parenthood of Pennsylvania, Reproductive Health and Counseling Center, Allentown Women's Center, National Abortion Rights Action League of Pennsylvania, Women's Medical Services and Allen Kline; leaving the three captioned Defendants, now Respondents herein.

Originally there were 28 Defendants. During the course of the litigation Petitioners and 22 other Defendants were dismissed. The 24 dismissed Defendants, in addition to Petitioners, were Reverend James P. Lisante; Pro-life Nonviolent Action Project of Bronx, New York; Thomas Herlihy; Pro-life Nonviolent Action Project of Philadelphia; Chester County Citizens Concerned About Life; John J. O'Brien; Council for the Sanctity of Human Life; Advocates for Life; Andrew Burnett; Direct Action Committee; Kathy Hoffer; Craig Hoffer; Life and Family Center; Andrew Schulberg; Pro-life Action League; Joseph Scheidler; Pro-life Direct Action League; John Ryan; Omaha Christian Action Council; Denny Hartford; Pro-life Nonviolent Action Project of Washington, D.C.; John Cavanaugh O'Keefe; fictitious-name John Smith(s) and fictitious-name Jane Smith(s). The surviving Defendants were Operation Rescue, Randall Terry, Michael McMonagle and Joseph Foreman.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
I. There Is A Split Of Authority Over Whether A District Court May Impose FRCivP 11 Sanctions When The Motion For Sanctions Is Filed Subsequent To A Voluntary Dismissal Pursuant To FRCivP 41(a); It Is Unclear Whether FRCivP 11 Motions Survive Both FRCivP 41(a)(i) and 41(a)(2) Voluntary Dismissal.	7
II. The Third Circuit Has Created A System Wherein An FRCivP 11 Movant May Be Denied Its Right To A Merits Review of Sanctions Denial.	11
CONCLUSION	14

APPENDIX Page

Memorandum Opinion, United States Court of Appeals for the Third Circuit, February 7, 1990; §C of which holds that the panel cannot reverse a prior panel's decision 1a

Memorandum Opinion, United States District Court for the Eastern District of Pennsylvania, June 19, 1989; §§II and III of which relate to timeliness of filing 7a

Order, United States District Court for the Eastern District of Pennsylvania, June 19, 1989; ¶3 of which denies sanctions 13a

Sur Petition for Rehearing, United States Court of Appeals for the Third Circuit, May 7, 1990; denying rehearing in banc 14a

Internal Operating Procedures, United States Court of Appeals For The Third Circuit, Pages 1 and 11-12 ..... 16a

TABLE OF AUTHORITIES

Community Electric Service of Los Angeles, Inc. v. National Electrical Contractors Association, Inc., 869 F 2d 1235 (9th Cir, 1989), *cert den*, 110 S Ct 236 9,10

Cooter & Gell v. Hartmarx Corporation, 58 USLW 4763 (June 11, 1990) 8

Denik, Inc. v. Hartmarx Corporation, 875 F 2d 890 (DC Cir, 1989), aff'd on point sub nom *Cooter & Gell v. Hartmarx Corporation* 9

Frazier v. Heebe, 482 US 641 (1987) 6

Johnson Chemical Company, Inc. v. Home Care Products, Inc., 823 F 2d 28 (2d Cir, 1987) ... 9,10

Kurkowski v. Volcker, 819 F 2d 201 (8th Cir, 1987) 9

Mary Ann Pensiero, Inc. v. Lingle, 847 F 2d 90 (3rd Cir, 1988) ..... *passim*

Muthig v. Brant Point Nantucket, Inc., 838 F 2d 600 (1st Cir, 1988) 9

Pavelic & LeFlore v. Marvell Entertainment Group, 493 US ___ (1990) 8

Schering Corporation v. Vitarine Pharmaceuticals, Inc., 889 F 2d 490 (1989) ..... *passim*

Szabo Food Service, Inc. v. Canteen Corporation, 823 F 2d 1073 (7th Cir, 1987), cert dismissed, 458 US 91 (1988) 9

West v. Keve, 721 F 2d 91 (3d Cir, 1983) 12

Statutes

26 USC §501(c)(3) 4

28 USC §1254(1) 2

28 USC §1291 14

28 USC §1331 2

28 USC §1334 2

28 USC §1964 2

42 USC §1985(3) 2

Table of Authorities Continued

Page

Rules

Supreme Court Rule 10.1(a) 12

Supreme Court Rule 29.1 ii

FRCivP 11 ..... *passim*

FRCivP 12(b) 10

FRCivP 41(a)(2) ..... *passim*

FRCivP 41(a)(1)(i) ..... *passim*

FRCivP 41(a)(1)(ii) ..... *passim*

FRCivP 54(b) 7

Law Reviews

Nelken, *Sanctions Under Amended Federal Rule—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo LJ 1313 (1986) 7

Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale LJ 901 (1988) 8

Note, *Plausible Pleading: Developing Standards For Rule 11 Sanctions*, 100 Harv L Rev 630 (1987) 8

Joseph, *The Trouble With Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 ABA J 87 (1987) 8

Schwarzer, *Rule 11 Revisited*, 101 Harv L Rev 1013 (1988) 8

Schwarzer, *Sanctions Under The New Federal Rule 11—A Closer Look*, 104 FRD 181 (1985) 8

Vairo, *Rule 11: A Critical Analysis*, 118 FRD 189 (1988) 7

Table of Authorities Continued

Page

Miscellany

American Bar Association Section of Litigation, *Sanctions: Rule 11 and Other Powers*, 2d edition (1988) 7

American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (Burbank, Reporter, 1989) 8

Joseph, *Sanctions: The Federal Law of Litigation Abuse*, Michie Company (1989) 8

THIRD CIRCUIT TASK FORCE ON FRCIVP 11 (1989) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No.

JUDITH A. BROWN AND AMERICAN LIFE LEAGUE, INC.,
Petitioners,

v.

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC AND
NORTHEAST WOMEN'S CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Mrs. Judith A. Brown and American Life League, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported. Appendix, infra, 1a. The opinion of the United States District Court for the Eastern District of Pennsylvania denying sanctions also is unreported. App 7a.

JURISDICTION

Invoking federal jurisdiction under 28 USC §§1331, 1334 and 1964, 42 USC §1985(3) and the doctrine of pendent jurisdiction, Plaintiffs below brought this suit against Petitioners and 26 other Defendants in the Eastern District of Pennsylvania. On March 7, 1989, the District Court dismissed Petitioners, with prejudice. Thereafter, Petitioners moved for sanctions under FRCivP 11. On June 19, 1989, the District Court denied the motion.

Petitioners appealed to the Third Circuit, which affirmed on February 7, 1990. Petitioners sought rehearing in banc, which the Third Circuit denied on May 7, 1990.

On June 5, 1990, Justice Brennan ordered that the time for filing this Petition for Writ of Certiorari be extended to and including August 1, 1990.

The jurisdiction of this honorable Court is invoked pursuant to 28 USC ¶1254(1).

STATUTORY PROVISIONS INVOLVED

Petitioners filed for sanctions against all original Plaintiffs, their attorneys and the Women's Law Center, which then employed the attorney who signed the Complaint, pursuant to FRCivP 11, which provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . .; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the

> extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

Petitioners on January 31, 1989 had filed for summary judgment. Two days later, on February 2, Plaintiffs filed to dismiss without prejudice under FRCivP 41(a)(2). On February 21 the District Court denied to Plaintiffs dismissal without prejudice and allowed Plaintiffs to seek dismissal with prejudice. On March 7 the District Court dismissed with prejudice. On May 17 Petitioners filed their FRCivP 11 sanctions motion.

FRCivP 41(a)(2) pertinently reads:

> . . . An action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper . . . . Unless otherwise specified in the order a dismissal under this paragraph is without prejudice.

STATEMENT OF THE CASE

Petitioner Judith A. Brown, a Virginia resident, is President of Petitioner American Life League, Inc.

("ALL"), a District of Columbia corporation, with its office in Stafford, Virginia. ALL is recognized under 26 USC §501(c)(3) as a tax-exempt organization. ALL is a social welfare and educational organization, incorporated in 1981, with some 240 thousand active donors across the country.

ALL researches and publishes a magazine, newsletters, brochures and other material relating to the human rights of persons born and unborn; sponsors, and participates in, symposia and other public and invitational means of discussion and education; monitors, and reports upon, pertinent state and federal administrative, legislative and judicial developments; and otherwise seeks to fulfill the mandate of its Articles of Incorporation and the concerns of its donors. Its professional and volunteer staff includes scientists, theologians, public administrators, lawyers and other persons who are, or who have become, cognizant in areas of factual and interpretive knowledge as to biological, theological, philosophic, legal, political and economic aspects of the rights of persons born and unborn.

The litigation herein began with the verification and filing of the Complaint on June 29, 1988—although not served upon Petitioners until August 24.

Injunctive proceedings, including the initial issuance on June 30 (ex parte as to Petitioners) of a Temporary Restraining Order, occurred during the course of the case, running through at least July 14, 1989. Petitioners Brown and ALL had no role in these proceedings nor in contempt proceedings which Plaintiffs brought as to sundry Defendants other than Petitioners.

Demonstrations about which Plaintiffs complained, and which were, inter alia, the subject of the June 30, 1988 Temporary Restraining Order, occurred during the week of July 4. Petitioners Brown and ALL had no role in these demonstrations. Plaintiffs had that knowledge before they served Petitioners, which did not occur until August 24, 1988.

Upon Plaintiffs' motion, the District Court dismissed all Plaintiffs' damages claims (other than those against the contempt Respondents) and 4 of 8 counts of the Complaint, leaving (exclusive of claims against the contempt Respondents) 4 counts and an attorneys fee claim against 4 of 28 original named Defendants, other than Petitioners.[1]

After discovery, Petitioners moved on January 31, 1989 for summary judgment. Two days later, on February 2, Plaintiffs moved for voluntary dismissal under FRCivP 41(a)(2). On February 21 the District Court denied dismissal without prejudice and allowed Plaintiffs to seek dismissal with prejudice. On March 7 the District Court so dismissed Petitioners Brown and ALL (and three others), thereby leaving 4 of 28 original named Defendants.

On May 17 Petitioners filed for FRCivP 11 sanctions. On June 19 the District Court denied sanctions. App 7a. On June 29 Petitioners moved for reconsideration, which was denied on July 11.

On August 8 Petitioners appealed. On appeal, Petitioners argued that the District Court misinterpreted *Mary Ann Pensiero, Inc. v. Lingle*, 847 F 2d

[1] Plaintiffs unsuccessfully sought certification of the Physician Class. The District Court certified the Womens' Class and subsequently decertified it.

90 (3rd Cir, 1988), in holding that it lacked authority to grant FRCivP 11 sanctions; and that, upon the merits at bar, the District Court abused its discretion in denying sanctions because Plaintiffs made no reasonable inquiry but included Petitioners solely upon the basis of the nominal cosponsorship by Petitioner ALL of a New York Operation Rescue, April 30-May 7, 1988, when Plaintiffs had almost two months to investigate before they filed the Complaint, another 56 days to investigate between the filing of the Complaint and service, and the demonstrations complained of were history more than a month prior to the time Plaintiffs served Petitioners. Counsel also had warned Counsel for Plaintiffs that there was no evidence of Petitioners' involvement and that process should not be served.[2]

The Court of Appeals sustained the District Court, holding that pursuant to the Third Circuit Internal Operating Procedures one panel could not reverse another and that the supervisory rule in *Pensiero* was a bar.

Seeking reconsideration, Petitioners argued that they effectively were denied an appeal because the

---

[2] More particularly, Petitioners argued that the *Pensiero* rule was a dictum to the case, not a binding rule; that the *Pensiero* dictum was inapplicable to the proceedings at bar when the District Court invoked it because it applied only to proceedings subsequent to the final judgment below; that the *Pensiero* rationale was inapplicable upon the facts; that *Pensiero* if a supervisory rule or a district court rule was promulgated unlawfully; and that if *Pensiero* properly constituted a mandatory rule, application would be unjustified under *Frazier v. Heebe*, 482 US 641 (1987). Petitioners also argued the substantive merits under the facts at bar.

panel held it lacked authority; that the *Pensiero* supervisory rule is merely a dictum; that, in fact, Petitioners did file for sanctions before final judgment, FRCivP 54(b);[3] that the mischief *Pensiero* is designed to avoid, a multiplicity of appeals, could not occur at bar because there could be, and was, but the one appeal by Petitioners[4] and that, on the merits, sanctions should have been awarded. The Court of Appeals denied rehearing in banc. App 14a.

This timely Petition follows.

REASONS FOR GRANTING THE PETITION

I. There Is A Split Of Authority Over Whether A District Court May Impose FRCivP 11 Sanctions When The Motion For Sanctions Is Filed Subsequent To A Voluntary Dismissal Pursuant To FRCivP 41(a); It Is Unclear Whether All FRCivP 11 Motions Survive Voluntary Dismissal.

FRCivP 11 may or may not have become the cottage industry of the litigation bar,[5] but in any event it is the subject of considerable litigation and commentary,[6] and twice during the October 1989 Term

---

[3] In view of the District Court's modification of the permanent injunction on June 9 and July 14, 1989, after the filing of Petitioners' FRCivP 11 motion—a point Petitions do not pursue herein.

[4] Certain other Defendants, approximately contemporaneously, filed an unrelated appeal, in which Petitioners neither were parties nor participants.

[5] Vairo, *Rule 11: A Critical Analysis*, 118 FRD 189, 199 (1988).

[6] E.g., American Bar Association Section of Litigation, *Sanctions: Rule 11 and Other Powers*, 2d edition (1988); Nelken, *Sanctions Under Amended Federal Rule—Some "Chilling" Prob-*

was visited by this Court. In addition to *Pavelic & LeFlore v. Marvell Entertainment Group*, 493 US ___ (1990), this Court also decided, inter alia, in *Cooter & Gell v. Hartmarx Corporation*, 58 USLW 4763 (June 11, 1990), that a voluntary FRCivP 41 (a)(1)(i) dismissal does not deprive a district court of jurisdiction over an FRCivP 11 motion filed before dismissal. This Court stops short of (1) extending that holding to a FRCivP 41(a)(2) dismissal or (2) holding that such dismissal does not deprive a district court of jurisdiction over an FRCivP 11 motion filed after, not before, the dismissal, inasmuch as those issues were not raised in *Cooter & Gell*.

Although the fertile minds of litigators may raise further questions, there are two obvious gaps: whether a district court has jurisdiction when the sanctions motion is filed after, not before, dismissal; and whether such jurisdiction survives an FRCivP 41(a)(2) dismissal as well as an FRCivP 41(a)(1) dismissal.

There is a conflict among circuits about timeliness.

---

lems in the Struggle Between Compensation and Punishment, 74 Geo LJ 1313 (1986); THIRD CIRCUIT TASK FORCE ON FRCIVP 11 (1989); Note, *Plausible Pleading: Developing Standards For Rule 11 Sanctions*, 100 Harv L Rev 630 (1987); Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale LJ 901 (1988); Schwarzer, *Rule 11 Revisited*, 101 Harv L Rev 1013 (1988); Joseph, *The Trouble With Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 ABA J 87 (1987); Joseph, *Sanctions: The Federal Law of Litigation Abuse*, Michie Company (1989); Schwarzer, *Sanctions Under The New Federal Rule 11—A Closer Look*, 104 FRD 181 (1985); American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (Burbank, Reporter, 1989).

The Courts of Appeals for the First, Seventh, Eighth, Ninth and District of Columbia Circuits have held that District Court jurisdiction over an FRCivP 11 motion survives voluntary dismissal. *Muthig v. Brant Point Nantucket, Inc.*, 838 F 2d 600 (1st Cir, 1988); *Szabo Food Service, Inc. v. Canteen Corporation*, 823 F 2d 1073 (7th Cir, 1987), cert dismissed, 458 US 91 (1988); *Kurkowski v. Volcker*, 819 F 2d 201 (8th Cir, 1987); *Community Electric Service of Los Angeles, Inc. v. National Electrical Contractors Association, Inc.*, 869 F 2d 1235 (9th Cir, 1989), cert den, 110 S Ct 236; *Denik, Inc. v. Hartmarx Corporation*, 875 F 2d 890 (DC Cir, 1989), aff'd on point sub nom *Cooter & Gell v. Hartmarx Corporation*. The Second Circuit has held to the contrary. *Johnson Chemical Company, Inc. v. Home Care Products, Inc.*, 823 F 2d 28 (2d Cir, 1987). The Third Circuit has gone both ways. *Pensiero* and *Schering Corporation v. Vitarine Pharmaceuticals, Inc.*, 889 F 2d 490 (1989).

Factual patterns, like the specifics of the results, vary, further suggesting this Court should address the matter.

In *Muthig*, the parties dismissed by stipulation, FRCivP 41(a)(1)(ii), and two months thereafter Defendants filed for FRCivP 11 sanctions. In *Szabo*, FRCivP 41(a)(1)(i) voluntary dismissal occurred on October 17, 1986 and the FRCivP 11 motion was filed on November 14. In *Kurkowski*, Plaintiffs on March 3, 1986 filed for FRCivP 11 41(a) dismissal. The District Court dismissed on March 4, 1986 pursuant to FRCivP 41(a)(1)(i), without prejudice. Some Defendants then moved to "retain jurisdiction over the case and impose sanctions . . . " 819 F 2d, at 202.

On March 14 the District Court "modified its dismissal order so it could decide the sanctions issue." The District Court on March 31 held hearings and "later issued a written order granting sanctions." Ibid. Under either of two rationales, without signifying which or both, the Court of Appeals held that the District Court "possessed authority for the issuance of the post-dismissal order, imposing sanctions." Ibid, at 203.[7] Defendants' sanctions motion was filed within ten days of the original judgment. In *Community Electric Service*, Defendants filed for FRCivP 11 sanctions within thirty days of the entry of judgment. The Court disapprovingly noted *Pensiero*. 869 F 2d, at 1242.

To the contrary, *Johnson Chemical Company*, holds that once there is an FRCivP 41(a)(1)(i) dismissal, there is no further jurisdiction. The dismissal notice was filed on November 4, 1986. Subsequently Defendant filed under FRCivP 11 and the District Court vacated the voluntary dismissal and sanctioned. The Court of Appeals overturned both the voluntary dismissal and the imposition of sanctions, both on the ground of lack of jurisdiction.

Thus, this Court, in *Cooter & Gell*, resolved the conflict among circuits as to district court FRCivP 11

---

[7] One rationale is that Defendants filed motions to dismiss before Plaintiffs voluntarily dismissed; that under FRCivP 12(b) "a defendant's motion to dismiss is transformed into a motion for summary judgment when matters outside the pleadings are also submitted . . . ", Ibid, at 203, and when a motion for summary judgment is outstanding, dismissal must be pursuant to FRCivP 41(a)(2) rather than automatic FRCivP 41(a)(1)(i) dismissal. The other rationale is "the district court's jurisdiction [in] its inherent authority over the cases and parties before it." Ibid, at 203.

jurisdiction when a voluntary dismissal occurs after the filing of the sanctions motion but has not taken the next step in resolving the same conflict when the sanctions motion is filed after such dismissal.

This Court's rationale in *Cooter & Gell* suggests no basis for a jurisdictional dichotomy based upon time of filing rather than time of sanctioning (or declining to sanction).

Likewise, this Court's *Cooter & Gell* rationale suggests no basis for a jurisdictional difference among FRCivP 41(a)(1)(i), 41(a)(1)(ii) and 41(a)(2) motions: each conceptually is the same result, achieved as a matter of right.[8]

II. The Third Circuit Has Created A System Wherein An FRCivP 11 Movant May Be Denied Its Right To A Merits Review of Sanctions Denial

Internal confusion exists within the Third Circuit as to restrictions upon a panel.

In *Pensiero*, a panel arguably promulgated a circuit-wide supervisory rule as to district court FRCivP 11 jurisdiction. If that promulgation is valid and binding, not only has another panel of the Third Circuit ignored it, *Schering*, but, by Internal Operating Procedures, not promulgated as rules, the Third Circuit purports to bind a panel to follow the decision of a predecessor panel, thereby denying an appellant the right to merits consideration of its appeal—the au-

---

[8] Under FRCivP 41(a)(1)(i), a plaintiff voluntarily dismisses before an answer or dispositive motion has been filed. Under FRCivP 41(a)(1)(ii), the parties dismiss voluntarily by stipulation. Under FRCivP 41(a)(2), a plaintiff voluntarily dismisses after an answer and/or dispositive motion has been filed.

thority for which would be first impression before this Court. Under this Court's Rule 10.1.(a),

> while neither controlling nor fully measuring the Court's discretion, this Court gives consideration to a circumstance in which . . . a United States court of appeals . . . has so far departed from the excepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision.

Hence, this Court has an opportunity to resolve, upon first impression, the Third Circuit muddle. As it now stands, a panel of the Third Circuit arguably has promulgated a supervisory rule, which, by virtue of Internal Operating Procedures, cannot be challenged, regardless of the facts, by any other panel, thereby depriving an appellant of merits adjudication, yet the rule is ignored by at least one other panel.

The facts in the *Schering* case, both at the trial and appellate levels, pertinently are identical to those at bar, in that in each Defendants filed, under FRCivP 41(a)(1)(i) in *Schering* and under FRCivP 41(a)(2) at bar, after voluntary dismissal. At bar, the panel, perceiving the *Pensiero* supervisory rule and the Internal Operating Procedures as a bar, declined merits review. *Schering*, after a considerably more extended analysis, and only passingly citing *Pensiero*,[9] reviewed on the merits, pertinently stating:

---

[9] The *Schering* panel citation to *Pensiero* is curious:

> . . . A district court, after entry of a final judgment and filing of a notice of appeal, retains the power to adjudicate collateral matters such as applications for counsel fees, *West v. Keve*, 721 F 2d 91, 95 n.5 (3d

> . . . to hold that a district court has no power to order sanctions after a voluntary dismissal is to emasculate Rule 11 and those cases where wily plaintiffs file baseless complaints, unnecessarily sap the precious resources of their adversaries and the courts, only to insulate themselves from sanctions by promptly filing a notice of dismissal.
>
> We hold the district court had jurisdiction to entertain and decide the Rule 11 motion after defendants suffered a voluntary dismissal under Rule 41(a)(1)(i). 889 F 2d at 496.

Thus, in *Schering*, a Third Circuit panel reviewed on the merits, ignoring *Pensiero* and the Internal Operating Procedures; at bar, a Third Circuit panel denied review on the merits, adhering to *Pensiero* and the Internal Operating Procedures.

Only this Court, exercising its supervisory powers, can restore to Petitioners their right to a merits review of sanctions denial and, in so doing, clear the Third Circuit muddle which prevents unlucky

---

Cir. 1983), and motions for sanctions under Rule 11, *Mary Ann Pensiero, Inc. v. Lingle*, 847 F 2d 90, 98 (3d Cir. 1988).

In fact, *Pensiero* purports to announce a supervisory rule which takes sanctions adjudication out of the collateral category unless the motion is filed before dismissal of, or judgment on, the action. The *Schering* panel may mean that *Pensiero* permits sanctions review only if the sanctions motion is filed before district court dismissal or judgment. In that event, the *Schering* statement, while consistent with *Pensiero*, is inconsistent with the facts in *Schering* and with the majority position among the circuits.

appellants from obtaining the merits review to which they statutorily are entitled, 28 USC § 1291, while lucky appellants obtain such review.

CONCLUSION

For the foregoing reasons, Petitioners Judith A. Brown and American Life League, Inc. pray that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

MARION EDWYN HARRISON*
DANIEL M. REDMOND
LAW OFFICES MARION EDWYN HARRISON
840 The Watergate
2600 Virginia Avenue, N.W.
Washington, D.C 20037
(202) 965-0800
Attorneys for Petitioners

**Counsel of Record*

July 31, 1990

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89-1672

JANE ROE; MARY MOE; NATIONAL ABORTION RIGHTS ACTION LEAGUE OF PENNSYLVANIA; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; REPRODUCTIVE HEALTH AND COUNSELING CENTER; WOMEN'S SUBURBAN CLINIC; ALLENTOWN WOMEN'S CENTER; NORTHEAST WOMEN'S CENTER; WOMEN'S MEDICAL SERVICES; DR. ALLEN KLINE

V.

OPERATION RESCUE; RANDALL TERRY; REVEREND JAMES P. LISANTE; PRO LIFE NONVIOLENT ACTION PROJECT OF BRONX, N.Y.; THOMAS HERLIHY; PRO LIFE NONVIOLENT ACTION PROJECT OF PHILADELPHIA; MICHAEL McMONAGLE; CHESTER COUNTY CITIZENS CONCERNED ABOUT LIFE; JOHN J. O'BRIEN; COUNCIL FOR THE SANCTITY OF HUMAN LIFE; JOSEPH FOREMAN; ADVOCATES FOR LIFE; ANDREW BURNETT; AMERICAN LIFE LEAGUE; JUDIE BROWN; DIRECT ACTION COMMITTEE; KATHY HOFFER; CRAIG HOFFER; LIFE AND FAMILY CENTER: ANDREW SCHULBERG; PRO LIFE ACTION LEAGUE: JOSEPH SCHEIDLER; PRO LIFE DIRECT ACTION LEAGUE: JOHN RYAN; OMAHA CHRISTIAN ACTION COUNCIL; DENNY HARTFORD; PRO LIFE NONVIOLENT ACTION PROJECT OF WASHINGTON, D.C.; JOHN CAVANAUGH O'KEEFE; SMITH(S), JOHN AND SMITH(S), JANE, the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of

defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein

JUDITH A. BROWN and AMERICAN LIFE LEAGUE, INC.,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 88-5157)
District Judge: Hon. Clarence C. Newcomer

Submitted Under Third Circuit Rule 12(6)
on January 19, 1990

Before: HIGGINBOTHAM, BECKER and NYGAARD,
Circuit Judges

(Opinion filed: FEB 7 1990)

MEMORANDUM OPINION

/s/ R. Nygaard
NYGAARD, *Circuit Judge*

Appellants, Judith A. Brown and American Life League, Inc. appeal an order by the district court denying their motion for Rule 11 sanctions. The district court, following *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90 (3d Cir. 1988), held that appellants' motion was untimely because it was filed after the entry of final judgment. For the reasons that follow we will affirm.[1]

---

[1] We can also affirm the district court's order as to all appellees except Kathryn Kolbert, who signed the complaint, under *Pavelic & LeFlore v. Marvel Entertainment Group*, ___ U.S. ___, 110 S. Ct. 456

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a district court's decision denying a motion for rule 11 sanctions for abuse of discretion. *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551 (3d Cir. 1989). However, we exercise plenary review of the legal standards applied by the district court in exercising its discretion. *Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718 (3d Cir. 1988).

I.

On June 29, 1988, appellees—several abortion clinics, a women's abortion rights group and prospective patients—filed a complaint seeking injunctive relief to prevent several parties, including appellants, from engaging in protesting activity that would blockade patient access to abortion clinics in Philadelphia and its metropolitan area. The court issued a temporary restraining order on June 30, 1988. On February 2, 1989, appellees moved to voluntarily dismiss their action against appellants without prejudice. The court denied this motion but, on March 7, 1989, it granted appellees a voluntary dismissal with prejudice. On April 18, 1989, the district court entered a final judgment against the remaining defendants. On May 1, 1989, the court granted appellees motion for attorneys' fees and costs against the remaining defendants. On May 9, 1989, appellants filed their motion for Rule 11 sanctions against appellees.

A.

Appellants argue that the district court erred in holding that *Pensiero* required dismissal of appellants' Rule 11 mo-

---

(1989). In *Pavelic*, the Supreme Court held that the phrase, "the person who signed it," contained in Rule 11 limits sanctions to the actual signer only and not her law firm. Under this reasoning, since Kathryn Kolbert is the only attorney who signed the complaint, only she could be subject to Rule 11 sanctions.

tion. Specifically, appellants argue that the rule in *Pensiero* is in dictum and therefore not a rule binding upon the district court. We disagree. In *Pensiero*, we stated,

> To carry out the objectives of expeditious disposition, we adopt as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment. Where appropriate, such motions should be filed at an earlier time—as soon as practicable after discovery of the Rule 11 violation.

Pensiero, 847 F.2d at 100. This language is not dictum, but is a supervisory rule for district courts to follow which regulates the manner of appeals. *See Napier v. Thirty or more Unidentified Federal Agents*, 855 F.2d 1080, 1090 (3d Cir. 1988) (citing *Pensiero*, 847 F.2d at 92, as "adopting supervisory rule requiring counsel to file Rule 11 motions before entry of final judgment by district court 'to eliminate piecemeal appeals' ").

B.

Appellants next argue that if the language in *Pensiero* is a rule, that it is not a supervisory rule which the Court of Appeals is permitted to promulgate; rather it is a rule governing procedure in the district court. As such, the promulgation of such a rule by the court of appeals in an opinion violates Rule 83 of the Federal Rules of Civil Procedure. We disagree. The rule was promulgated to eliminate fragmented appeals and promote judicial efficiency. *Pensiero*, 847 F.2d at 99. The rule accomplishes those purposes, and is not, as characterized by appellants, a district court rule subject to the procedures of Rule 83 of the Federal Rules of Civil Procedure.

C.

Appellants next argue that, even if this rule is a supervisory rule, the court of appeals did not comply with

28 U.S.C. §§ 2071(b), 2071(d) and 2077(a) or Rule 47 of the Federal Rules of Appellate Procedure. Essentially, appellants ask us to reverse *Pensiero* because the panel in *Pensiero* did not comply with the law. However, under Rule 8-C of our Internal Operating Procedures a prior opinion of this court can be challenged only when the court of appeals sits in banc. We cannot reverse a prior panel's decision.

D.

Appellants next urge that even if the rule in *Pensiero* is proper, it should not be applied to them because the concerns justifying the rule in *Pensiero* do not exist here.[2] Appellants argue that *Pensiero* should not be applied to motions that are filed after a judgment but before an appeal because the motion for sanctions in *Pensiero* was filed post appeal. The rule in *Pensiero* is not so limited. It requires that all Rule 11 motions be filed *before* entry of *final judgment*. Furthermore, the procedure herein belies appellants' assertion that no fragmented appeals have occurred. Appellants' Rule 11 motion has generated an appeal separate from the appeal on the merits—the exact situation the rule in *Pensiero* was designed to prevent.

III.

Appellants failed to file their Rule 11 motion before the entry of final judgment. Under *Pensiero*, this failure is fatal to their motion. We shall affirm the order of the district court dismissing appellants' motion.

---

[2] Appellants also argue that *Pensiero* does not apply because their motion was timely filed. They assert that the judgment entered against them on April 18, 1989 was not final because the court later modified the injunction. This argument fails. The finality of a permanent injunction issued by a district court is not destroyed when the district court modifies the injunction when necessary. *United States v. Local 30, et al*, 871 F.2d 401 (3d Cir. 1989).

TO THE CLERK:

Please file the foregoing opinion.

/s/ R. Nygaard
Circuit Judge

APPENDIX B

DISTRICT COURT OF PENNSYLVANIA

CIVIL ACTION NO. 88-5157

JANE ROE, *ET AL.*

v.

OPERATION RESCUE, *ET AL.*

FILED: JUN 19 1989

MEMORANDUM

Newcomer, J. June 19, 1989

This was an action for declaratory and injunctive relief sought against various anti-abortion activists. Because the factual background of this action appears in the court's Memorandum dated May 1, 1989, it need not be repeated here. This action began almost one year ago, and after several hearings and over two hundred documents filed in this case, the court is well acquainted with the litigation and the various parties and their counsel. Presently before the court are several defendants' motions for attorney's fees and sanctions under Fed. R. Civ. P. 11.

I. *The Instant Motions*

Presently before the court are the following motions: (1) defendant Joseph Foreman's motion for attorney's fees under Rule 11; (2) defendant Council for the Sanctity of Human Life's (CSHL) motion for attorney's fees under Rule 11; (3) defendants Judith Brown and American Life League, Inc.'s (ALL) motion for Rule 11 sanctions; and (4) defendant Chester County Citizens Concerned About Life's (CCCCAL) motion for attorney's fees under Rule 11. By way of back-

ground information, defendant Joseph Foreman was found in civil contempt for violating a temporary restraining order issued by this court. Foreman also had judgment entered against him on plaintiffs' § 1985(3) (right to travel), trespass, and intentional interference with contractual relations claims. Defendants CSHL, Judith Brown, ALL, and CCCCAL were named defendants who upon plaintiff's motion were dismissed with prejudice from the action on March 3, 1989, pursuant to Fed. R. Civ. P. 41(a)(2).

II. *Sanctions Under Fed. R. Civ. P. 11*

Under Rule 11, the signature of an attorney or party on pleadings and papers indicates that to the best of the signer's belief, the document is "well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . ." Fed. R. Civ. P. 11. To comply with these requirements, the attorney must conduct a "reasonable investigation of the facts and a normally competent level of legal research to support the presentation." *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 94 (3d Cir. 1988) (citation omitted). An objective standard of reasonableness under the circumstances at the time the paper was submitted is used for testing conduct under Rule 11, and "the wisdom of hindsight should be avoided." *Id.* at 94.

In deciding whether counsel's inquiry prior to filing the complaint is "reasonable" under Rule 11, the Third Circuit has cited five factors as relevant: the amount of time available to counsel for conducting the factual and legal investigation; the necessity for reliance on the client for the underlying factual information; the plausibility of the legal position advocated; whether the case was referred to counsel by another attorney; and the complexity of the legal and factual issues involved. *Pensiero*, 847 F.2d at 95. Sanctions under Rule 11 are appropriate "only if the filing of the complaint constituted abusive litigation or mis-

use of the court's process," *id.* at 95 (quoting *Teamsters Local Union No. 430 v. Cement Express, Inc.*, 841 F.2d 66, 68 (3d Cir. 1988)), and are reserved "for only exceptional circumstances." *Pensiero*, 847 F.2d at 99.

III. *Discussion*

A. *Timeliness of the Rule 11 Motions*

In the instant litigation, defendants CSHL, Judith Brown, ALL, and CCCCAL were dismissed from the action with prejudice in an Order dated March 3, 1989. Final judgment against defendant Foreman and others was entered on April 18, 1989. The Third Circuit has adopted a supervisory rule for courts in this circuit that "all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment," if not earlier. *Pensiero*, 847 F.2d at 100. Defendants Foreman and CSHL filed their Rule 11 motions on May 9, 1989. Defendants Brown and ALL filed their Rule 11 motions on May 17, 1989, while defendant CCCCAL filed its Rule 11 motion on May 18, 1989. As each of the Rule 11 motions was filed *after* the entry of final judgment or dismissal from the case, they are untimely under the Third Circuit's supervisory rule announced in *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 98-100 (3d Cir. 1988), and therefore need not be considered by the court.

B. *Merits of the Rule 11 Motions*

Although the untimeliness of the filing of the motions obviates consideration on the merits, the court has considered the merits anyway. After such consideration, based on an objective standard of reasonableness, avoiding the wisdom of hindsight, and in light of the applicable legal standards, the court finds that plaintiffs' filing of the complaint against the instant defendants and their conduct of the subsequent litigation did not constitute "abusive litigation or misuse of the court's process." Furthermore, the court makes the following conclusions: (1) plaintiffs' inquiry prior to filing

the complaint was reasonable under Rule 11; (2) the dismissal of various defendants pursuant to Fed. R. Civ. P. 41(a)(2) in March 1989 does not indicate that a violation of Rule 11 occurred; (3) the dismissal of certain plaintiffs and certain causes of action does not indicate that a violation of Rule 11 occurred; and (4) none of the other arguments or criticisms of plaintiffs' conduct constitute violations of Rule 11. As the Third Circuit has noted, Rule 11 is misused "when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987). Some of the arguments advanced by defense counsel in the instant motions come dangerously close to constituting such misuse of the Rule.

In sum, the court finds that defendants have failed to show any "exceptional circumstances" warranting the imposition of Rule 11 sanctions.

C. *Motions for Attorney's Fees Under 42 U.S.C. § 1988*

Defendants Foreman and CSHL have also requested attorney's fees under 42 U.S.C. § 1988. Under § 1988, the court may allow reasonable attorney's fees to the prevailing party in a suit brought under 42 U.S.C. § 1985. A defendant may be considered a "prevailing party" under § 1988 "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983). *See, e.g., Curry v. A.H. Robins Co.*, 775 F.2d 212 (7th Cir. 1985) (upholding award of § 1988 fees to prevailing defendant after dismissal of plaintiff's § 1983 claim based on finding that it was without foundation); *cf. Sobel v. Yeshiva Univ.*, 619 F. Supp. 839, 844 (S.D. N.Y. 1985) (refusing to award fees to a *partially* prevailing defendant "in view of the strong public policy favoring civil rights plaintiffs").[1]

[1] Neither the court's research nor that of the parties have located a case in which § 1988 attorney's fees were awarded to a *partially* prevailing defendant.

Foreman was found in civil contempt for violating a temporary restraining order issued by this court. Foreman also had judgment entered against him on plaintiffs' § 1985(3) (right to travel), trespass, and intentional interference with contractual relations claims, and a permanent injunction has been entered against him in this case. Judgment was entered in favor of Foreman on plaintiffs' § 1985(3) (right to abortion) and intentional infliction of emotional distress claims. Defendant CSHL was dismissed with prejudice from the action on March 3, 1989, pursuant to Fed. R. Civ. P. 41(a)(2).

After review and consideration of the complaint and the subsequent litigation involving Foreman and CSHL, the court finds that suit against these parties was neither vexatious, frivolous, nor brought to harass or embarrass them. In Foreman's case, the court finds particularly noteworthy that he had judgment entered against him on several claims, was found in contempt for violating a temporary restraining order of this court, and had a permanent injunction entered against him. With regard to CSHL, the mere fact that plaintiffs voluntarily dismissed it from suit does not mean that the claims against it were frivolous or that it becomes a "prevailing party" for § 1988 fee purposes. *See Colombrito v. Kelly*, 764 F.2d 122, 130 (2d Cir. 1985) (§ 1988 defendant dismissed with prejudice is not considered "prevailing party"). Accordingly, the court does not find either defendant to be a "prevailing party" under § 1988 and therefore will not grant their requests for § 1988 fee awards.

D. *Other Issue*

As part of the motion filed by defendants Judith Brown and ALL, their counsel Marion Edwyn Harrison[2] refers to, and has attached to the motion, a transcript of a tele-

---

[2] Harrison, a Washington, D.C. attorney, was admitted pro hac vice in this case. *See* Order filed September 13, 1988.

phone conversation between himself and plaintiffs' counsel Mary McLaughlin. *See* Defendants Brown and ALL Motion for Sanctions, Exhibit 4. Plaintiffs claim that the recording of the telephone conversation and the subsequent disclosure of its content were done without the knowledge or consent of McLaughlin. Plaintiffs further assert, and it appears to the court, that the recording of this conversation without the consent or knowledge of McLaughlin constitutes a violation of professional ethics. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 337 (1974) (With a limited exception not present here, "no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation," based on DR 1-102(A)(4) of the Code of Professional Responsibility[3]). In addition, such recording and disclosure may also constitute a violation of state law. *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 5703 (Purdon 1983). In any event, Harrison's recording and subsequent disclosure of a telephone conversation without the knowledge or consent of the other party to the conversation represent a lack of both professional and common courtesy. In light of the possible violation of the ethical standards of the profession, I will forward a copy of this Memorandum to the appropriate state disciplinary authorities for review.

An appropriate order follows.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

---

[3] Disciplinary Rule 1-102(A)(4) provides that a lawyer shall not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 88-5157

JANE ROE, *ET AL.*

v.

OPERATION RESCUE, *ET AL.*

ORDER

AND NOW, this 19th day of June, 1989, in accordance with the accompanying Memorandum, it is hereby Ordered that:

1. Defendant Joseph Foreman's motion for attorney's fees under Rule 11 (docket entry no. 192) is DENIED.

2. Defendant Council for the Sanctity of Human Life's (CSHL) motion for attorney's fees under Rule 11 (docket entry no. 193) is DENIED.

3. Defendants Judith Brown and American Life League, Inc.'s (ALL) motion for Rule 11 sanctions (docket entry no. 194) is DENIED.

4. Defendant Chester County Citizens Concerned About Life's (CCCCAL) motion for attorney's fees under Rule 11 (docket entry no. 197) is DENIED.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1672

JANE ROE; MARY MOE; NATIONAL ABORTION RIGHTS ACTION LEAGUE OF PENNSYLVANIA; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; REPRODUCTIVE HEALTH AND COUNSELING CENTER; WOMEN'S SUBURBAN CLINIC; ALLENTOWN WOMEN'S CENTER; NORTHEAST WOMEN'S CENTER; WOMEN'S MEDICAL SERVICES; DR. ALLEN KLINE

V.

OPERATION RESCUE; RANDALL TERRY; REVEREND JAMES P. LISANTE; PRO LIFE NONVIOLENT ACTION PROJECT OF BRONX, N.Y.; THOMAS HERLIHY; PRO LIFE NONVIOLENT ACTION PROJECT OF PHILADELPHIA; MICHAEL McMONAGLE; CHESTER COUNTY CITIZENS CONCERNED ABOUT LIFE; JOHN J. O'BRIEN; COUNCIL FOR THE SANCTITY OF HUMAN LIFE; JOSEPH FOREMAN; ADVOCATES FOR LIFE; ANDREW BURNETT; AMERICAN LIFE LEAGUE; JUDIE BROWN; DIRECT ACTION COMMITTEE; KATHY HOFFER; CRAIG HOFFER; LIFE AND FAMILY CENTER: ANDREW SCHULBERG; PRO LIFE ACTION LEAGUE: JOSEPH SCHEIDLER; PRO LIFE DIRECT ACTION LEAGUE: JOHN RYAN; OMAHA CHRISTIAN ACTION COUNCIL; DENNY HARTFORD; PRO LIFE NONVIOLENT ACTION PROJECT OF WASHINGTON, D.C.; JOHN CAVANAUGH O'KEEFE; SMITH(S), JOHN AND SMITH(S), JANE, the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of

defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein

JUDITH A. BROWN and AMERICAN LIFE LEAGUE, INC.,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 88-5157)

SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, COWEN, NYGAARD, *Circuit Judges.*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ R. Nygaard
Circuit Judge

DATED: MAR 7 1990

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Internal Operating Procedures

April 1988

[Table of Contents omitted in printing.]

INTRODUCTION

A. Objectives.

These "Internal Operating Procedures" (IOPs) cover the essential processes of this court from the distribution of the briefs to the final termination of the appeal:

To insure that appeals are processed as expeditiously as possible consistent with a careful discharge of proper appellate responsibilities;

To foster the long established practice and traditions of this court to avoid intra-circuit conflict of decisions and to maintain the highest degree of collegiality among the judges.

B. Policy of the Court.

In order that a panel's decisions may reflect input from the entire court on the law in this circuit, these procedures are designed:

1. To insure the opportunity for contributions by every active member of the court to every decision of precedential or institutional significance.
2. To insure decisional stability of the court by providing a means for the panel system to operate efficiently and at the same time provide that a published opinion of the court expressed by a panel may not be overruled without the approval of a majority of the full court.

3. To afford judges maximum freedom in administering justice in this multi-judge court.

C. Implementation.

These IOPs implement:

1. Statutory mandates
2. Federal Rules of Appellate Procedure
3. Rules of the Court of Appeals for the Third Circuit
4. Customs, practices, and traditions of this court.

[Pages 2-11 omitted in printing.]

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred: (1) in refusing to charge on the testimony of an accomplice as requested by appellant; (2) in admitting hearsay testimony of a witness and (3) in refusing to grant a motion of acquittal on the theory of insufficiency of evidence; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

CHAPTER 7. RETAINING JURISDICTION

Where the disposition of an appeal contains an order retaining jurisdiction in this court, upon return of this court after remand to the district court, the case will be assigned to that panel which ordered the retention of jurisdiction here, or to another panel if ordered by the Chief Judge.

CHAPTER 8. HEARING OR REHEARING IN BANC CRITERIA

A. **Hearing In Banc.** Initial in banc hearing ordinarily is ordered by a majority of the active judges only if there is a determination that the case is controlled by a prior decision of the court which should be reconsidered or the case is of such great importance as to require initial consideration by the full court.

B. **Rehearing In Banc.** Rehearing in banc is not favored and ordinarily will not be ordered except

1. Where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

2. Where the proceeding involves a question of exceptional importance.

This court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

C. **Policy of Avoiding Intra-Circuit Conflict of Precedent.** It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court in banc consideration is required to overrule a published opinion of this court.

D. **Acceleration.** The need to accelerate a case scheduled for in banc hearing will be determined by majority vote of the court. However, it is the policy of the court to hold an in banc hearing only at a regularly scheduled in banc session of the court.

CHAPTER 9. REHEARING

A. **Court Originated.**

1. **Draft opinions to be circulated.** All judgment orders and those unanimous unpublished per curiam or memorandum opinions which affirm the judgment or decision of the trial court or which grant enforcement of or deny a petition for review of agency action are not circulated beyond the panel. All other opinions are circulated by the opinion-writing judge to all active judges who are not on the panel with a request that they notify him in the event that they have comments or desire the case to be considered in banc. The active judge who has written a dissenting opinion is presumed to have voted for rehearing in banc unless he indicates in writing to the contrary.

2. **Effect of non-response.** A judge who does not desire rehearing or who has no comment is not expected to respond.

3. **Time limits.** The opinion is deemed cleared for filing on the eighth day after the date of its transmittal by the opinion-writer. A request for rehearing must be received by the opinion-writing judge within the eight-day period. If, after a judge has voted for rehearing, another judge desires more time to consider or reconsider in banc rehearing, he shall timely circulate a letter asking that the time for voting be extended for a period not to exceed five working days beyond the eight-day time period. This request results in an automatic extension. Irrespective of the number of such requests, the voting time automatically will be extended this one period only. Further extensions of time may be granted only by the Chief Judge upon application.

4. **Responsibility for order.** If, following the circulation of the draft opinion and any concurring or dissenting opinions, a majority of the active judges request that the case be considered in banc, the ranking judge who has voted for rehearing, or the opinion-writing judge, if he has voted for rehearing and is an active judge of this court, enters an order for rehearing in banc.

   After the briefs in the case have been distributed to the members of the court who will participate in the in banc consideration thereof,

* * *

Supreme Court, U.S.
FILED
OCT 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-217

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JUDITH A. BROWN and AMERICAN LIFE LEAGUE, INC.,
Petitioners,
v.
ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC and
NORTHEAST WOMEN'S CENTER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

NANCY J. BREGSTEIN
Counsel of Record
MARY A. MCLAUGHLIN
JEROME M. MARCUS
LORI LOWENTHAL STERN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000
Counsel for Respondents

October 12, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioners' Rule 11 motion was properly denied as untimely under a Third Circuit supervisory rule which requires such motions to be made before the entry of final judgment in the district court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THERE IS NO CONFLICT FOR THIS COURT TO RESOLVE BECAUSE THE DECISION BELOW DOES NOT CALL INTO QUESTION A DISTRICT COURT'S JURISDICTION OVER RULE 11 MOTIONS FILED AFTER A VOLUNTARY DISMISSAL	5
II. THE AFFIRMANCE OF THE DENIAL OF PETITIONERS' RULE 11 MOTION WAS CORRECT AND PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW	6
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: Page

Abney v. *United States*, 431 U.S. 651 (1977) 7
ADW, Inc. v. *Lutheran Social Mission Society*, 1989 U.S. Dist. LEXIS 8408 (E.D. Pa. July 19, 1989) 9
Association of Civilian Technicians v. *Federal Labor Relations Authority*, 756 F.2d 172 (D.C. Cir. 1985) 8
Bonner v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) 8
Bowe v. *INS*, 597 F.2d 1158 (9th Cir. 1979) 8
Conklin v. *Lovely*, 834 F.2d 543 (6th Cir. 1987) 8
Cooter & Gell v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990) ..... *passim*
Cupp v. *Naughten*, 414 U.S. 141 (1974) 6
Dudley v. *Dittmer*, 795 F.2d 669 (8th Cir. 1986) 8
Hilmon v. *Hyatt Int'l*, 899 F.2d 250 (3d Cir. 1990) 9
In re Luma Camera Service, Inc., 157 F.2d 951 (2d Cir. 1946) 8
Jusino v. *Zayas*, 875 F.2d 986 (1st Cir. 1989) 8
Kimberly-Clark Corp. v. *Fort Howard Paper Co.*, 772 F.2d 860 (Fed. Cir. 1985) 8
Klapprott v. *United States*, 335 U.S. 601 (1949) 7
Mary Ann Pensiero, Inc. v. *Lingle*, 847 F.2d 90 (3d Cir. 1988) ..... *passim*
Mixing Equipment Co. v. *Innova Tech, Inc.*, 9 U.S.P.Q.2d 1057 (E.D. Pa. 1988) 9
Muller v. *Temura Shipping Co.*, 1989 U.S. Dist. LEXIS 8411 (E.D. Pa. July 24, 1989) 9
Napier v. *Thirty or More Federal Agents*, 855 F.2d 1080 (3d Cir. 1988) 9
North Carolina Utilities Comm'n v. *FCC*, 552 F.2d 1036 (4th Cir. 1977) 8
Provident Bank v. *Manor Steel Corp.*, 882 F.2d 258 (7th Cir. 1989) 7
Roe v. *Operation Rescue*, 1989 U.S. Dist. LEXIS 4688 (E.D. Pa. May 2, 1989) 2
Ryals v. *Estelle*, 661 F.2d 904 (5th Cir. 1981) 8

TABLE OF AUTHORITIES—Continued

Page

Savage v. *Cache Valley Dairy Assoc.*, 737 F.2d 887 (10th Cir. 1984) 8
Schering Corp. v. *Vitarine Pharmaceuticals, Inc.*, 124 F.R.D. 580 (D.N.J.), aff'd, 889 F.2d 490 (3d Cir. 1989) 8, 9
Thiel v. *Southern Pac. Co.*, 328 U.S. 217 (1946) 7
United States v. *Cheramie*, 520 F.2d 325 (5th Cir. 1975) 7
United States v. *Dunbar*, 611 F.2d 985 (5th Cir. 1980) 7
United States v. *Foster*, 469 F.2d 1 (1st Cir. 1972) 7

Statutes and Rules:

Civil Rights Act of 1964, Tit. I, 42 U.S.C. § 1981 *et seq.*:
§ 1985(3) 2
§ 1988 2
Fed. R. Civ. P.:
Rule 11 ..... *passim*
Rule 41 ..... 2, 5, 9
18 Pa.C.S. § 5703 (Purdon 1983) 3

Other Authorities:

Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, Ch. 2.D.1 3
J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* (2d ed. 1985) 2, 8
C. Wright & A. Miller, *Federal Practice & Procedure* (1971 & Supp. 1990) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-217

JUDITH A. BROWN and AMERICAN LIFE LEAGUE, INC.,
Petitioners,

v.

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC and
NORTHEAST WOMEN'S CENTER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully request that the petition for a writ of certiorari be denied.

STATEMENT

1. *The original lawsuit.* In May, 1988, several health clinics in the Philadelphia area, including respondents, learned that they would be the subject of anti-abortion demonstrations and blockades during the week of July 4, 1988. The blockades were organized and executed by an entity called Operation Rescue, along with its individual and group supporters. On June 29, 1988, the clinics filed a complaint seeking declaratory and injunctive relief from the planned actions, and they requested a temporary restraining order ("TRO") and a preliminary in-

junction. Petitioners, who were listed as co-sponsors of Operation Rescue's activities in Operation Rescue literature, were among those named as defendants.

On June 30, 1988, the district court granted a TRO barring the defendants' actions. The demonstrations and blockades were held nonetheless, in violation of the court's order. On December 5, 1988, the district court therefore held Operation Rescue and four individuals in contempt. On March 3, 1989, with respondents' consent, the district court ordered petitioners Brown and ALL, and three other defendants, dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a)(2).

The district court granted permanent injunctive relief against the remaining defendants on March 21, 1989, holding that their activities were unlawful under 42 U.S.C. § 1985(3) and under the common law doctrines of trespass and intentional interference with contractual relations. Because the court's order gave respondents all the relief they had sought in their complaint, they moved voluntarily to dismiss certain remaining counts. The district court granted that motion on April 18, 1989, and entered final judgment on that date. On May 1, 1989, the district court found respondents entitled to attorney's fees as prevailing parties under 42 U.S.C. § 1988, and awarded them over $70,000 in fees and costs. In so holding, the district court expressly found that "[respondents'] counsel in the instant matter obtained superb results * * *." *Roe* v. *Operation Rescue*, 1989 U.S. Dist. LEXIS 4688, *18 (E.D. Pa. May 2, 1989).

2. *The Rule 11 proceedings.* On May 17, 1989, well after final judgment had been entered, petitioners filed a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure.[1] On June 19, 1989, the district

---

[1] Petitioners have quoted an outdated version of Rule 11, see Pet. 2-3, which was in force only until 1987. Compare 2A J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 11.01[3] (2d

court denied the motion as untimely under a Third Circuit supervisory rule, announced in *Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90, 94 (1988), requiring that Rule 11 motions be filed before the entry of final judgment, so that a single appeal can resolve both the merits and any issue concerning sanctions.

The district court also went on, however, to address the Rule 11 motion on its merits. After noting that it was "well acquainted with the litigation and the various parties and their counsel," Pet. App. 7a, the court held, as an alternative ground for its decision, that respondents' conduct did not constitute " 'abusive litigation or misuse of the court's process.' " *Id.* 8a-9a (quoting *Pensiero*, 847 F.2d at 95). On the contrary, the district court stated that "[s]ome of the arguments advanced by [petitioners'] counsel in the instant motions come dangerously close to constituting * * * misuse of the Rule." *Id.* 10a.[2] Petitioners' motion for reconsideration was denied on July 11, 1989.

After deciding that oral argument on petitioners' appeal was unnecessary,[3] the court of appeals affirmed the

---

ed. 1985) (setting out the 1983 version of the rule) with *id.* at ¶ 11.01[6] (setting out the current version).

Petitioners' motion was one of three Rule 11 motions filed by several of the defendants. All three motions were denied.

[2] The district court also chastised petitioners' counsel, Marion Edwyn Harrison, for recording a conversation between himself and Mary McLaughlin, counsel for respondents, without her consent. (Harrison had attached the transcript of this conversation to his Rule 11 motion.) The district court suggested that by recording this telephone call Harrison had breached his ethical obligations and may also have violated state law. See 18 Pa.C.S. § 5703 (Purdon 1983). The district court directed that a copy of its opinion describing this conduct be forwarded to the appropriate state bar disciplinary authorities for their review. Pet. App. 10a, 12a.

[3] Chapter 2.D.1 of the Third Circuit's Internal Operating Procedures explains that "judges usually vote to eliminate oral argument * * * [w]here the issue is tightly constrained [and] not

denial of the Rule 11 motion, on the ground that petitioners' motion was untimely under the supervisory rule announced in *Pensiero*. Rehearing and rehearing in banc were denied on March 7, 1990. The instant petition followed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Contrary to petitioners' suggestion, this case does not present any issue with respect to a district court's jurisdiction to hear a Rule 11 motion after a case has been voluntarily dismissed. The decision below thus does not even call into question, much less contravene, this Court's holding in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990), that district courts have jurisdiction over Rule 11 motions filed after a voluntary dismissal. Neither, of course, does it conflict with circuit court decisions on the issue resolved by *Cooter & Gell*.

Rather, the decision below is an unexceptional application of the Third Circuit's supervisory rule that Rule 11 motions should be made before the entry of a final judgment, so that appellate review can be accomplished in an efficient and orderly fashion. That rule leaves ample time after dismissal for a dismissed party to move under Rule 11, and therefore does not touch upon the concerns that animated the Court in *Cooter & Gell*.

Moreover, the supervisory rule applied below is a sensible one, well within the power of the court of appeals, and it has been consistently followed by that court. In any event, the district court here *did* consider the merits of petitioners' Rule 11 motion, in spite of its untimeliness, and held in the alternative that the motion was so lacking in merit as to approach misuse of the Rule. Review by this Court is accordingly not warranted.

---

novel * * * [or] [w]here the outcome of the appeal is clearly controlled by a decision of the Supreme Court or this court."

ARGUMENT

I. THERE IS NO CONFLICT FOR THIS COURT TO RESOLVE BECAUSE THE DECISION BELOW DOES NOT CALL INTO QUESTION A DISTRICT COURT'S JURISDICTION OVER RULE 11 MOTIONS FILED AFTER A VOLUNTARY DISMISSAL.

There is no conflict between the decision below and the decisions of this Court or other courts of appeals on the question of district court jurisdiction to hear Rule 11 motions after a voluntary dismissal. The court of appeals did not base its affirmance of the denial of petitioners' Rule 11 motion on any lack of jurisdiction in the district court to entertain such motions after a voluntary dismissal. In fact, the decision below says nothing at all about *jurisdiction* to hear Rule 11 motions. Rather, the court below applied the Third Circuit's procedural rule, announced pursuant to its supervisory powers in *Mary Ann Pensiero, Inc.* v. *Lingle*, 847 F.2d 90 (1988), that Rule 11 motions must be made before the entry of *final judgment* in order to facilitate the orderly presentation of appeals. In *Pensiero* itself, the Third Circuit discussed the jurisdictional issue at length and expresly held that district courts *have* jurisdiction to hear a Rule 11 motion not only after a voluntary dismissal but after final judgment has been entered. 847 F.2d at 97-98.

This Court resolved the pre-existing conflict over jurisdiction following voluntary dismissals under Rule 41(a)(2) in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990). There the Court held—as the Third Circuit had correctly anticipated in *Pensiero*—that district courts have such jurisdiction. Accordingly, there is no longer a conflict among the circuits on the jurisdictional question. The decisions from other circuits cited by petitioners (at 9) to show this "circuit split" were decided before this Court's resolution of the question in *Cooter & Gell*, and most of them were specifically cited in the *Cooter & Gell* opinion. See 110 S. Ct. at 2455.

While some questions conceivably might remain regarding the application of *Cooter & Gell* to other issues under Rule 41, no such question is presented by this petition. In this case, petitioners had over six weeks between their voluntary dismissal on March 3 and the entry of final judgment on April 18 in which they could have filed their Rule 11 motion.[4] The *Pensiero* rule would not have prevented such a filing. Thus, there is no conflict for the Court to resolve and no need for this Court's attention to any question of jurisdiction after dismissal under the sections of Rule 41 not involved in *Cooter & Gell.*

II. THE AFFIRMANCE OF THE DENIAL OF PETITIONERS' RULE 11 MOTION WAS CORRECT AND PRESENTS NO ISSUE WARRANTING THIS COURT'S REVIEW.

1. As the Third Circuit explained in *Pensiero,* the supervisory rule formulated in that case was the result of the court of appeals' experience with piecemeal appeals. 847 F.2d at 99. Its goal is to ensure that the court of appeals may dispose of appeals on the merits and any Rule 11 issues in a single hearing. *Ibid.*

That action was entirely within the power of the court of appeals. In *Cupp* v. *Naughten,* 414 U.S. 141, 146 (1974), this Court stated that, in "exercising the so-called supervisory power of an appellate court," a court of appeals "may * * * require [the district court] to fol-

---

[4] Indeed, counsel for Brown and ALL was aware of the facts he claims gave rise to the Rule 11 violation since even before the case formally began, and he certainly could have filed the motion at any time after respondents filed for voluntary dismissal on February 2, 1989. As the Third Circuit itself explained in *Pensiero,* there is no need in a Rule 11 context like this to wait until the end of the litigation to resolve sanctions issues, as there might be in the context of a remedy like attorney's fees. See 847 F.2d at 98-99. But instead of filing a Rule 11 motion petitioners' counsel merely threatened to do so repeatedly, until well after the entry of final judgment.

low procedures deemed desirable from the viewpoint of sound judicial practice." And in *Abney* v. *United States*, 431 U.S. 651, 662 n.7 (1977), this Court noted specifically that "it is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars" to determine the pace at which appeals are presented and resolved.[5]

More generally, this Court has made clear that the supervisory power of a superior over an inferior court permits the formulation of rules like that promulgated in *Pensiero*. See, *e.g.*, *Thiel* v. *Southern Pac. Co.*, 328 U.S. 217 (1946) (imposing supervisory rule regulating the choice of jury members).[6] Accordingly, the court of appeals had ample power to promulgate the *Pensiero* rule.[7]

---

[5] *Cf. Cooter & Gell*, 110 S. Ct. at 2457 (noting that "[d]istrict courts may, of course, 'adopt local rules establishing timeliness standards'" for the filing of Rule 11 motions) (quoting *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 454 (1982)).

[6] This Court has used its own supervisory powers over the lower courts on numerous occasions. See, *e.g.*, *Klapprott* v. *United States*, 335 U.S. 601 (1949); *Thiel*, *supra*.

[7] Exercises of supervisory powers as in *Pensiero* are common among the courts of appeals, particularly to govern the path by which a case makes it way from trial to appellate court. See, *e.g.*, *United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980) (announcing supervisory rule allowing district courts to maintain jurisdiction and proceed with criminal trial while appeal pending on double jeopardy challenge to indictment); *Provident Bank* v. *Manor Steel Corp.*, 882 F.2d 252 (7th Cir. 1989) (announcing supervisory rule requiring magistrate to inform parties that they must file objections identifying issues to be resolved on appeal within ten days of issuance of magistrate's decision). See generally *United States* v. *Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972) (announcing supervisory rule requiring district courts to warn defendants of the risks of joint representation); *United States* v. *Cheramie*, 520 F.2d 325 (5th Cir. 1975) (acknowledging supervisory power to restrict utilization within the circuit of certain jury instructions even though no constitutional right would be abridged by that instruction's issuance).

Moreover, the rule announced in *Pensiero* is a sensible one. Inasmuch as Rule 11 questions are so often bound up with the merits of the issues in a case, the *Pensiero* rule ensures that review of a case's merits is accomplished simultaneously with review of any decision regarding sanctions. As this case illustrates, without such a rule the courts will continue to be plagued with fragmented appeals.[8] There is no need for this Court to review the wisdom of this particular procedural rule, which the Third Circuit viewed as advisable for the orderly presentation and disposition of appeals.[9]

2. The Third Circuit's own decisions are not inconsistent on the question of jurisdiction over Rule 11 motions. There is no inconsistency at all between *Pensiero* and *Schering Corp.* v. *Vitarine Pharmaceu-*

---

[8] In this case, for example, separate appeals were filed by petitioners, on their Rule 11 questions, and by other defendants, on the merits of the summary judgment and permanent injunction rulings. Contrary to petitioners' assertion that the other appeals were "unrelated" to this one, Pet. 7, the court of appeals consolidated the appeals for purposes of disposition.

[9] Petitioners complain that the panel in this case considered itself bound by the panel decision in *Pensiero*. Pet. 11-12. But petitioners offer no argument or authority suggesting any impropriety in this practice, which the courts of appeals regularly and expressly follow. See 1B *Moore's Federal Practice* ¶ 0.402[1], at 19 (footnote omitted) ("[i]n the case of a court that sits in panels, a decision of a panel constitutes a decision of the court and carries the weight of stare decisis in a subsequent case before the same or a different panel"). See, *e.g.*, *Association of Civilian Technicians* v. *Federal Labor Relations Authority*, 756 F.2d 172, 176 (D.C. Cir. 1985); *Jusino* v. *Zayas*, 875 F.2d 986, 993 (1st Cir. 1989); *In re Luma Camera Service*, 157 F.2d 951, 954-955 (2d Cir. 1946); *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036, 1044 n.8 (4th Cir. 1977); *Ryals* v. *Estelle*, 661 F.2d 904, 906 (5th Cir. 1981); *Conklin* v. *Lovely*, 834 F.2d 543, 549 (6th Cir. 1987); *Dudley* v. *Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986); *Bowe* v. *INS*, 597 F.2d 1158, 1159 n.1 (9th Cir. 1979); *Savage* v. *Cache Valley Dairy Assoc.*, 737 F.2d 887, 889 (10th Cir. 1984); *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1210 (11th Cir. 1981); *Kimberly-Clark Corp.* v. *Fort Howard Paper Co.*, 772 F.2d 860, 863 (Fed. Cir. 1985).

ticals, Inc., 889 F.2d 490 (3d Cir. 1989). Under *Pensiero*, Rule 11 motions must be made before the district court enters final judgment, so that the Third Circuit can resolve the merits and any Rule 11 motions in a single appeal.[10] *Schering*, however, unlike *Pensiero*, involved a Rule 41(a)(1)(i) voluntary dismissal—*i.e.*, one entered before the defendant had answered the complaint or moved for summary judgment. Such a dismissal may be had as of right and requires no order of court. No final judgment is ever entered when a case is disposed of in this way. See 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2363, at 158-159 (1971 & Supp. 1990).[11]

Moreover, even if such an inconsistency did exist it would not merit this Court's review. The courts within the Third Circuit have consistently followed the *Pensiero* rule since it was announced in 1988.[12] A single stray panel decision deviating from this clear pattern would properly be resolved by the Third Circuit itself, and would not require attention from this Court. The Third Circuit's denial of the petition for rehearing in banc makes clear that that court has heard and rejected petitioner's claim of an inconsistency between the two opinions.

---

[10] *Pensiero* does not speak to the power of a district court to impose Rule 11 sanctions *sua sponte* after the entry of final judgment.

[11] Indeed, the district court in *Schering* had not entered a final judgment when the Third Circuit resolved the Rule 11 issue in that case. See 124 F.R.D. 580, 584 (D.N.J. 1989). *Pensiero*'s supervisory rule was thus completely irrelevant in that context.

[12] See, *e.g.*, *Hilmon* v. *Hyatt Int'l*, 899 F.2d 250 (3d Cir. 1990); *Napier* v. *Thirty or More Federal Agents*, 855 F.2d 1080 (3d Cir. 1988); *Muller* v. *Temura Shipping Co.*, 1989 U.S. Dist. LEXIS 8411 (E.D. Pa. July 24, 1989); *ADW, Inc.* v. *Lutheran Social Mission Society*, 1989 U.S. Dist. LEXIS 8408 (E.D. Pa. July 19, 1989); *Mixing Equipment Co.* v. *Innova Tech Inc.*, 9 U.S.P.Q.2d 1057 (E.D. Pa. 1988).

3. Even if there were any basis for concern about the *Pensiero* rule, this would not be an appropriate case in which to consider it because here the district court *did* address the merits of petitioners' Rule 11 motion in spite of its untimeliness. The court concluded that respondents had not been guilty of any impropriety in the conduct of this case and that, indeed, if any abuse had occurred, it was on the part of petitioners. See Pet. App. 10a.[13] Inasmuch as this decision would be reviewed, if at all, only for abuse of discretion, see *Cooter & Gell*, 110 S. Ct. at 2461, the absence of review by the court of appeals is not worthy of this Court's consideration. This case would therefore be a particularly inappropriate vehicle for considering a dismissed party's argument that it was denied consideration of the merits of its motion.

---

[13] The record fully supports the district court's ruling. In naming Brown and ALL as defendants, respondents reasonably relied on the fact that they were both listed as "co-sponsors" of Operation Rescue in its brochure. That alone was sufficient to satisfy Rule 11's requirement of "a reasonable investigation of the facts and a normally competent level of legal research to support the presentation." *Pensiero*, 847 F.2d at 94 (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 157 (3d Cir. 1986)). Hence the district court correctly found that:

> (1) [respondents'] inquiry prior to filing the complaint was reasonable under Rule 11; (2) the dismissal of various defendants pursuant to Fed. R. Civ. P. 41(a)(2) * * * does not indicate that a violation of Rule 11 occurred; (3) the dismissal of certain defendants and certain causes of action does not indicate that a violation of Rule 11 occurred; and (4) none of the other arguments or criticisms of [respondents'] conduct constitute violations of Rule 11. * * * *Some of the arguments advanced by [petitioners'] counsel in the instant motions come dangerously close to constituting * * * misuse of the Rule.*

Pet. App. 10a (emphasis added).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NANCY J. BREGSTEIN
Counsel of Record
MARY A. MCLAUGHLIN
JEROME M. MARCUS
LORI LOWENTHAL STERN
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 981-2000
Counsel for Respondents

October 12, 1990

Supreme Court, U.S.
FILED
OCT 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JUDITH A. BROWN AND AMERICAN LIFE LEAGUE, INC.,
Petitioners,

v.

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN,
WOMEN'S SUBURBAN CLINIC AND
NORTHEAST WOMEN'S CENTER,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONERS' REPLY BRIEF

MARION EDWYN HARRISON*
DANIEL M. REDMOND
LAW OFFICES MARION EDWYN HARRISON
840 The Watergate
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 965-0800
Attorneys for Petitioners

* *Counsel of Record*

October 29, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
CORRECTIONS TO RESPONDENTS' [RE]STATEMENT	1
ARGUMENT	3
I. THE DECISION BELOW DEPRIVES THE DISTRICT COURT OF JURISDICTION OVER POST-JUDGMENT FRCIVP 11 MOTIONS	3
II. THE *PENSIERO* RULE DID NOT PREVENT FRAGMENTED APPEALS. IT PREVENTED A MERITS REVIEW	5

TABLE OF AUTHORITIES

Cases Page

Cooter & Gell v. Hartmarx Corporation, 110 S Ct 2447 (1990) 5

Mary Ann Pensiero, Inc. v. Lingle, 847 F 2d 90 (3rd Cir, 1988) ..... *passim*

Schering Corporation v. Vitarine Pharmaceuticals, Inc., 889 F 2d 490 (1989) ..... *passim*

Rules

FRCivP 11 ..... *passim*

FRCivP 41(a)(1)(i) ..... *passim*

FRCivP 41(a)(2) ..... *passim*

FRCivP 54(b) 4

Treatise

5 J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice*, ¶41.05 [3] (2d ed 1985) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-217

JUDITH A. BROWN AND AMERICAN LIFE LEAGUE, INC.,
Petitioners,

v.

ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN, WOMEN'S SUBURBAN CLINIC AND NORTHEAST WOMEN'S CENTER,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONERS' REPLY BRIEF

CORRECTIONS TO RESPONDENTS' [RE]STATEMENT

Respondents inaccurately and misleadingly restate the case.

1. *The original lawsuit.* (a) All proceedings prior to August 24, 1988 were ex parte to Petitioners, who were not served until August 24. (b) Petitioners took no part in any demonstration. The demonstrations about which Respondents complain occurred during the week of July 4. (c) There is no evidence of

Petitioners' involvement in any way in planning, organizing, financing or participating in, a demonstration. (d) Petitioners never were contempt respondents. (e) Petitioners were not "listed as co-sponsors of Operation Rescue's activities in Operation Rescue literature . . ." Rather, Petitioner American Life League, Inc. was listed on one flier as a nominal cosponsor of a New York Operation Rescue, April 30-May 7, 1988—not Philadelphia, not July. (f) No act or event mentioned in §1, either full paragraph, on page 2 of the Brief in Opposition (other than the FRCivP41(a)(2) dismissal) relates to Petitioners. (g) The April 18, 1989 final judgment, to which Respondents refer, is a judgment against other Defendants, not against Petitioners, and does not involve Petitioners.

2. *The FRCivP 11 proceedings.* (a) The District Court's comment, quoted as applicable to "[petitioners'] counsel", in fact, is misquoted and had nothing to do with Petitioners' Counsel. Pet App 10a.[1] (b) The District Court did not "address the Rule 11 motion on its merits." Opposition, at 3. Rather, the District Court lumped together four separate FRCivP 11 motions and, in conclusory fashion, rejected them all. Pet App 7a-10a.

Further, the conduct in the District Court is not an issue before this Court.

---

[1] Respondents' fn 2, page 3, is demeaning, irrelevant and inaccurate. Pet App 11a. Respondents complained to the District Court about a telephone conversation. The District Court, without waiting for Petitioners' response, accepted Respondents' accusations and referred the matter to the District of Columbia Bar, which investigated and on January 5, 1990 closed the file, finding no disciplinary violation.

ARGUMENT

I. THE DECISION BELOW DEPRIVES THE DISTRICT COURT OF JURISDICTION OVER POST-JUDGMENT FRCIVP 11 MOTIONS.

In *Mary Ann Pensiero, Inc. v. Lingle,* 847 F 2d 90 (1988), the Court of Appeals, while holding that the District Court had jurisdiction to adjudicate the post-judgment motion therein, deprived future district courts of that authority. The Court below applies *Pensiero.* Hence, the Court below denies such authority. Thus, jurisdiction effectively is denied.

In *Pensiero,* the Third Circuit in a previous appeal already had affirmed the District Court's grant of summary judgment. After receipt of the affirmance but before mandate, Defendants moved for FRCivP 11 attorneys fees. Because those Defendants could have raised the sanctions question in the earlier appeal on the merits, it is not surprising that the *Pensiero* panel announced the supervisory rule. *Pensiero* illustrates perfectly the fragmented appeals that the Court wanted stopped. No such appeal is at issue in this case. Nor was it possible procedurally for Petitioners at bar to file fragmented appeals.

The objective of the *Pensiero* rule is to end fragmented appeals. A defendant which benefits from voluntary dismissal with prejudice cannot appeal. Hence, the concern expressed in *Pensiero* does not exist with respect to any such dismissal. Petitioners could not have appealed the dismissal herein. As Professor Moore points out:

> . . . Where the trial court permits the plaintiff to dismiss with prejudice and thereby gives the defendant the basic relief to which he is

> entitled the judgment is not appealable by the defendant . . .
>
> 5 J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice*, ¶41.05 [3] (2d ed 1985).

Under the definition in FRCivP 54(a) of a judgment as "a decree or any order from which an appeal lies", there was no final judgment involving Petitioners in the District Court. In consequence, when Petitioners filed after dismissal they did not violate the *Pensiero* supervisory rule.

That the Third Circuit could not have intended its rule to include parties such as Petitioners is clear from *Schering Corporation v. Vitarine Pharmaceuticals, Inc.*, 889 F 2d 490 (3d Cir 1989). In *Schering*, Plaintiffs filed an FRCivP 41(a)(1) notice of dismissal and Defendants moved for an FRCivP 11 order after they were out of the case by virtue of the voluntary dismissal. Respondents claim that *Schering* presents a different situation than that of Petitioners because no final judgment is entered when a plaintiff voluntarily dismisses under FRCivP 41(a)(1)(i).

Neither is a final judgment entered when a party leaves a suit by court order issued under FRCivP 41(a)(2) as happened here. By its own terms, the supervisory rule is inapplicable for it requires that FRCivP 11 motions be filed before the entry of final judgment. Respondents' argument to distinguish the parties in *Schering* from Petitioners underlines the validity of Petitioners' point: two panels of the Third Circuit inconsistently treat parties in the same procedural situation. Had Petitioners been the sole Defendants at bar, no final judgment as to any party would have been issued. If the Third Circuit had fol-

lowed *Schering*, Petitioners would not have been deprived of their appeal of the sanctions denial; just as they would not have been so deprived had the panel at bar followed *Schering*.

Cooter & Gell v. Hartmarx Corp., 110 S Ct 2447 (1990), plainly does not speak to jurisdiction over an FRCivP 11 motion filed after a district court final judgment. The decision below does. Thus, this Court has the opportunity to close the two-pronged gap: (1) to extend the *Cooter & Gell* holding to include a FRCivP 41(a)(2) dismissal as well as a FRCivP 41(a)(1)(i) dismissal; and (2) to hold that such dismissal does not deprive a district court of jurisdiction when an FRCivP 11 motion is filed after, not before, judgment.[2]

II. THE *PENSIERO* RULE DID NOT PREVENT FRAGMENTED APPEALS. IT PREVENTED A MERITS REVIEW.

The *Pensiero* rule is unmerited as applied. Petitioners timely appealed their FRCivP 11 denial; other Defendants appealed other issues. The Court of Appeals consolidated not because of common or related issues but because the appeals arose from the same case and were approximately contemporaneous. The Court issued a separate opinion with respect to Petitioners' appeal, implicitly recognizing Petitioners'

---

[2] The top paragraph, Opposition, at 6, is inaccurate and irrelevant. (1) Petitioners did not voluntarily dismiss; Respondents did. (2) The measure of elapsed time between dismissal and judgment is meaningless. The issue is disparate treatment of post-judgment FRCivP 11 motions, not of prejudgment motions. (3) Further, the judgment at bar relates to other Defendants, not to Petitioners.

appeal was unrelated to the other appeals.[3] The *Pensiero* rule did not prevent a multiplicity of appeals; it prevented a merits review of denial of sanctions to Petitioners.[4] This Petition does not challenge circuit supervisory rules per se. It challenges a rule which, as sweepingly applied, deprives Petitioners of a merits appeal other circuits allow and which, if an appellant draws a *Schering*-minded panel, the Third Circuit also allows.

The case at bar and *Schering*, of course, are inconsistent, because in each there was no final judgment as to the parties appealing an FRCivP 11 ruling, yet Petitioners were denied a merits appeal while the *Schering* appellants were granted one. The District Court and the Court of Appeals herein both applied the *Pensiero* prohibition at bar; they obviously thought *Pensiero* applies when there is a final judgment even though the final judgment does not relate to Petitioners, who already were dismissed. Thus, *Pensiero* and *Schering* are inconsistent.

Respondents' further dwelling upon the District Court proceedings[5] is irrelevant. The District Court's conduct is not before this Court.

---

[3] Contrary to Respondents' assertion, Opposition, at 9, neither that opinion nor the denial of rehearing in banc cites *Schering* or recognizes the inconsistency between the two opinions. Pet App 1a, 14a.

[4] There could not be more than one appeal by Petitioners: they had nothing but sanctions denial to appeal. In *Pensiero*, the FRCivP 11 appeal was not filed until the prior appeal was adjudicated. At bar, there was not—and could not be—fragmented appeals by Petitioners.

[5] Fn 13, Opposition, at 13, again misstates the facts. (1)

Respectfully submitted,

MARION EDWYN HARRISON*
DANIEL M. REDMOND
LAW OFFICES MARION EDWYN HARRISON
840 The Watergate
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 965-0800
Attorneys for Petitioners

**Counsel of Record*

October 29, 1990

Respondents relied upon a flier pertaining to another event, in another city, at another time. There was no inquiry. (2) The District Court cast no aspersion on Petitioners' use of FRCivP 11. Respondents alter the District Court's language to make it appear otherwise.